Syed Iskandar bin Syed Jaafar v Kerajaan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–63–11 OF 2020
WAN AHMAD FARID J
5 APRIL 2024

Constitutional Law — Legislation — Validity of impugned legislation — Whether ouster clause in art 150(8) of Federal Constitution ('FC') was constitutional — Whether plaintiff had locus standi to challenge said legislation — Whether application was not frivolous or unsustainable to deserve to be summarily struck off — Whether validity or otherwise of Yang di-Pertuan Agong's Proclamation of Emergency under art 150 of FC on advice of Cabinet was not a justiciable matter

The plaintiff filed the instant originating summons ('OS') to declare art 150(8) of the Federal Constitution ('the FC') unconstitutional, null and void and of no effect. Clause (8) was inserted into art 150 by the Constitution (Amendment) Act 1981 ('Act A514') to oust the jurisdiction of the court to entertain or determine any application, question or proceeding in whatever form on any ground regarding the validity of, inter alia, a Proclamation of Emergency or of a declaration made in such Proclamation by the Yang di-Pertuan Agong ('the YDPA') under art 150(1). The plaintiff argued that any constitutional amendment that attempted to oust the court's jurisdiction to inquire into the validity of any law or other form of State action would violate the FC's basic structure, namely, the doctrine of separation of powers, by infringing upon the judicial power of the Federation. In support of the OS, it was also submitted that art 150(8) appeared to allow the YDPA to exercise unfettered power or discretion. The first defendant applied (vide encl 86) to strike out the OS on the ground that the plaintiff had no locus standi to file it and also because the OS was an abuse of process of court.

Held, dismissing both encl 86 and the OS:

(1) The plaintiff, who was a practising lawyer, was not a phantom busybody or ghostly intermeddler. At this stage (in the context of locus standi), what the plaintiff needed to show was only an arguable case to defeat the application to strike out. The issues raised in the OS were of constitutional importance and arose from a genuine public grievance (see paras 30–31).

(2) So long as there were some questions of law or issues raised in the pleadings that merited consideration, no matter how slight the chances of

success, the court ought not to use its summary powers of dismissal and strike out the action. The instant OS could not be said to be obviously unsustainable within the meaning of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. On that ground alone, encl 86 ought to be dismissed *in limine* (see paras 21–23).

(3) The 'basic structure' doctrine was an intrinsic part of the FC and unless sanctioned by the FC itself, any statute (including one that amended the FC) that offended the basic structure might be struck down as unconstitutional (see paras 59 & 85).

(4) This court had to give effect to the ouster clause in art 150(8)(b) of the FC. The majority of the authorities suggested that in proclaiming the Emergency, the YDPA acted on the advice of the Cabinet as provided in art 40(1) of the FC. It was therefore a matter of policy that involved the security or economic life of the nation or public order in the Federation. Matters of security and policy were within the domain of the Executive. When the security of the Federation was under threat and the Cabinet, in its wisdom and based on the intelligence information it possessed, advised the YDPA to proclaim an Emergency, it was not for the court, based on art 150(8)(b) of the FC, to determine or entertain its validity. Any attempt by the court to intervene was itself violative of the basic structure of the FC since it offended the doctrine of separation of powers (see paras 81 & 84–85).

(5) The exercise of powers by the YDPA, in effect, the Cabinet, in proclaiming the Emergency under art 150 of the FC was not justiciable. Whilst the ouster clause in art 150(8) of the FC looked harsh and unjust, the remedy lay in the Legislature and not the courts. Article 150(8) did not violate the basic structure of the FC and could not be struck down under art 4(1) of the FC (see para 85).

[Bahasa Malaysia summary

Plaintif memfailkan saman pemula semasa ('SP') untuk mengisytiharkan perkara 150(8) Perlembagaan Persekutuan ('PP') tidak berperlembagaan, terbatal dan tidak sah dan tidak berkuat kuasa. Perkara (8) telah dimasukkan ke dalam perkara 150 oleh Akta Perlembagaan (Pindaan) 1981 ('Akta A514') untuk menghapuskan bidang kuasa mahkamah untuk melayan atau menentukan apa-apa permohonan, persoalan atau prosiding dalam apa jua bentuk atas apa-apa alasan mengenai kesahihan, antara lain, Proklamasi Darurat atau pengisytiharan yang dibuat dalam Proklamasi sedemikian oleh Yang di-Pertuan Agong ('YDPA') di bawah perkara 150(1). Plaintif berhujah bahawa sebarang pindaan perlembagaan yang cuba menghapuskan bidang kuasa mahkamah untuk menyiasat kesahihan mana-mana undang-undang atau bentuk lain tindakan Negara akan melanggar struktur asas PP, iaitu, doktrin pengasingan kuasa, dengan melanggar kuasa kehakiman Persekutuan.

Dalam menyokong SP, ia juga dikemukakan bahawa perkara 150(8) nampaknya membenarkan YDPA menggunakan kuasa atau budi bicara yang tidak terikat. Defendan pertama memohon (melalui lampiran 86) untuk membatalkan SP atas alasan bahawa plaintif tidak mempunyai locus standi untuk memfailkannya dan juga kerana SP itu adalah penyalahgunaan proses mahkamah.

Diputuskan, menolak kedua-dua lampiran 86 dan SP:

(1) Plaintif, yang merupakan seorang peguam yang beramal, bukanlah seorang penyibuk atau perantara tidak bermuka. Pada peringkat ini (dalam konteks locus standi), apa yang perlu ditunjukkan oleh plaintif hanyalah kes untuk dibicarakan bagi menentang permohonan untuk pembatalan. Isu yang dibangkitkan dalam SP adalah kepentingan perlembagaan dan timbul daripada rungutan awam yang tulen (lihat perenggan 30–31).

(2) Selagi terdapat beberapa persoalan undang-undang atau isu yang dibangkitkan dalam pliding yang patut dipertimbangkan, tidak kira betapa kecilnya peluang untuk berjaya, mahkamah tidak sepatutnya menggunakan kuasa ringkasnya untuk menolak dan membatalkan tindakan itu. SP semasa tidak boleh dikatakan jelas tidak boleh dipertahankan dalam pengertian *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. Atas alasan itu sahaja, lampiran 86 harus diketepikan (lihat perenggan 21–23).

(3) Doktrin 'struktur asas' adalah bahagian intrinsik PP dan melainkan jika dibenarkan oleh PP sendiri, mana-mana statut (termasuk yang meminda PP) yang melanggar struktur asas mungkin akan dibatalkan sebagai tidak berperlembagaan (lihat perenggan 59 & 85).

(4) Mahkamah ini harus menguatkuasakan klausa penghapusan dalam perkara 150(8)(b) PP. Majoriti pihak berkuasa mencadangkan bahawa dalam mengisytiharkan Darurat, YDPA bertindak atas nasihat Jemaah Menteri seperti yang diperuntukkan dalam perkara 40(1) PP. Oleh itu, perkara dasar yang melibatkan keselamatan atau kehidupan ekonomi negara atau ketenteraman awam dalam Persekutuan. Perkara keselamatan dan dasar adalah dalam domain Eksekutif. Apabila keselamatan Persekutuan terancam dan Jemaah Menteri, dalam kebijaksanaannya dan berdasarkan maklumat risikan yang dimilikinya, menasihatkan YDPA untuk mengisytiharkan Darurat, ia bukan untuk mahkamah, berdasarkan perkara 150(8)(b) PP, untuk menentukan atau mengesahkan kesahihannya. Sebarang percubaan oleh mahkamah untuk campur tangan adalah melanggar struktur asas PP kerana ia melanggar doktrin pengasingan kuasa (lihat perenggan 81 & 84–85).

(5) Penggunaan kuasa oleh YDPA, sebenarnya, Jemaah Menteri, dalam

mengisytiharkan Darurat di bawah perkara 150 PP adalah tidak wajar. Walaupun klausa penghapusan dalam perkara 150(8) PP kelihatan keras dan tidak adil, remedinya terletak di Badan Perundangan dan bukannya mahkamah. Perkara 150(8) tidak melanggar struktur asas PP dan tidak boleh dibatalkan di bawah perkara 4(1) PP (lihat perenggan 85).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 47, SC (refd)
Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal [2020] 4 MLJ 773, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (folld)
Dato' Sri Anwar bin Ibrahim v PP [2002] 3 MLJ 193, FC (folld)
Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829, FC (refd)
Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133, FC (refd)
Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor [2021] 6 MLJ 68, FC (refd)
Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356, FC (folld)
Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 841, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
R (on the application of Miller) v The Prime Minister; Cherry and ors v Advocate General for Scotland [2019] UKSC 41, SC (refd)
R v Board of Visitors of Dartmoor Prison, ex parte Smith [1987] QB 106, CA (refd)
R v Secretary of State for Home Department, ex parte Salem [1999] AC 450, HL (refd)
Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors [2014] 11 MLJ 481, HC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anor case [2017] 3 MLJ 561, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia [2010] 2 MLJ 333, FC (folld)
Stephen Kalong Ningkan v Government of Malaysia [1968] 2 MLJ 238, PC (refd)

Stephen Kalong Ningkan v Government of Malaysia [1968] 1 MLJ 119, FC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Constitution of the State of Sarawak art 41
Courts of Judicature Act 1964 s 84
Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)
Emergency (Federal Constitution and Constitution of Sarawak) Act 1966
Federal Constitution arts 4(1), 40, 40(1), (1A), 50, 150, 150(1), (5), (6), (8), (8)(b), (9), 161E(2), Part II
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) s 47
Malaysia Act 1963
Prison Rules 1964 [UK]
Rules of Court 2012 O 19 r 19

Kengadharan a/l Ramasamy (R Kengadharan & Co) for the plaintiff.
Shamsul Bolhassan (with Liew Horng Bin and Nor' Aqilah bt Abdul Halim) (Attorney's Generals Chambers) for the first defendant.
Abi Mursyudin Awal (with Aidil Khalid) (Amelda Fuad Abi & Aidil) for the second defendant.
Nur Adilah Nabilah (with Nurin Husnina Azureen Ibrahim) (Raja Riza & Assoc) for the third, fourth and fifth defendants.
Khaizan Sharizad bt Ab Razak (with K Shanmuga and HY Kee) (Seira & Sharizad) for the sixth defendant.
Nur Mustanir bin Md Nor (with Muhammad Rafique Rashid Ali) (Law Practice of Rafique) for the seventh, eighth, ninth, tenth and 11th defendants.
Bastian Vendargon (with Annemarie Pravina Vendargon) (Bastian Vendargon) for the Bar Council.

Wan Ahmad Farid J:

THE PARTIES

[1] The plaintiff is an advocate and solicitor.

[2] The first defendant is the Government of Malaysia ('GOM'). The second defendant is the Secretary General of the Muslim Lawyers Association of Malaysia ('PPMM'). The third, fourth and fifth defendants are legal practitioners.

[3] The sixth defendant, Centre for a Better Tomorrow, is a company limited by guarantee. It is principally engaged in creating awareness of social

issues in Malaysia. The seventh to 11th defendants were the members of Dewan Rakyat and Dewan Negara at the material time.

[4] The GOM is the initial defendant in this OS. However, pursuant to separate applications made by the parties, my learned predecessor had allowed the second to 11th defendants to intervene on 18 February 2021.

[5] In furtherance to the said order dated 18 February 2021, the second to 11th defendants were added as defendants in this OS. Subsequently, the plaintiff filed an amended OS on 21 April 2021 in encl 93.

THE PLAINTIFF'S CASE

[6] This OS is supported by the affidavit of the plaintiff in encl 2 ('AIS2'). There are further exchanges of affidavits filed by the parties, which will be referred to in this judgment as and when the need arises.

[7] On 23 October 2020, the then Prime Minister advised His Majesty the 16th Yang di-Pertuan Agong to issue a proclamation of emergency pursuant to art 150 of the Federal Constitution. It is not in dispute that the aforesaid advice had been agreed upon by the Cabinet through a special Cabinet meeting.

[8] Two days later, on 25 October 2020, following a meeting of the Conference of Rulers, the Yang di-Pertuan Agong expressed His Majesty's opinion that a proclamation of emergency in the country or any part of the country was unnecessary.

[9] The plaintiff was of the view that the opinion expressed by the then Yang di-Pertuan Agong amounted to a rejection of the Prime Minister's advice.

[10] According to the plaintiff, the decision of the then Yang di-Pertuan Agong has given rise to questions of constitutional and public importance, as follows:

(i) whether on a true construction of arts 40 and 50 of the Federal Constitution, the Yang di-Pertuan Agong has an unfettered discretion not to declare an emergency despite advice of the Prime Minister or the Federal Cabinet to the contrary; and

(ii) whether Act A514 which amended art 150 by adding cll (8) and (9) is violative of the basic structure of the Federal Constitution having regard to art 4(1) thereof.

[11] However, in his affidavit in encl 38 ('AIS38'), the plaintiff acknowledged that the GOM in another matter before the Federal Court in

Civil Reference No 06(RS)-1–03 of 2019(W) in the case of *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133 had conceded that Yang di-Pertuan Agong is under a duty to follow the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet.

[12] The plaintiff further affirmed in AIS38 that in view of the concession made by the GOM, question (i) in the OS is 'therefore academic and both parties are on common ground'.

[13] In para 9 of AIS38, the plaintiff affirmed that the only question to be deliberated and determined in the OS is question (ii). As alluded to earlier, it concerns art 150(8). As to art 150(9), learned counsel for the plaintiff, in his written submission in para 15 of encl 142, conceded that it is valid.

[14] In the circumstances, what remains to be decided in this OS is the validity of art 150(8) of the Federal Constitution.

THE IMPUGNED ARTICLE

[15] The relevant clauses of art 150 of the Federal Constitution ('the FC'), which were introduced by the Constitution (Amendment) Act 1981 ('Act A514'), which are the subject matter of contention, are reproduced below:

(8) Notwithstanding anything in this Constitution —

(a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of —

(i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

(iii) any ordinance promulgated under Clause (2B); or

(iv) the continuation in force of any such ordinance.

(9) For the purpose of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House.

THE APPLICATION IN ENCL 86

[16] I will first deal with the application in encl 86.

[17] By way of an application in encl 86, the GOM seeks to strike out the plaintiffs OS pursuant to O 19 r 19 of the Rules of Court 2012 ('the ROC'). The grounds of the application are anchored on the following:

(a) the plaintiff has no locus standi to file this OS; and

(b) the OS is an abuse of the process of the court since question (ii) has been rendered academic.

[18] On 2 June 2022, this court has dismissed the application filed by the plaintiff in encl 92. The application in encl 92, was made under s 84 of the Courts of Judicature Act 1964 ('the CJA'), whereby the plaintiff sought an order to stay the proceedings in this OS to enable this court to transmit a question that has arisen in question (ii) in the form of a special case to the Federal Court.

[19] Before me, learned counsel for the plaintiff submitted that inherent in my decision on 2 June 2022 is that there are serious questions to be argued between the parties as to the validity of the impugned clauses in art 150. Learned counsel for the plaintiff contended that the ruling constitutes an issue estoppel against the parties to the lis.

[20] In dismissing the application in encl 92, I indicated that I was not prepared to proffer any answer to question (ii) since it was premature and could only be deliberated and determined at the main hearing of this OS. In short, my refusal to answer the question summarily indicates that difficult questions of law are involved.

[21] Putting things into perspective, I can only echo the view of Vazeer Alam JC (now JCA) in *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors* [2014] 11 MLJ 481 that so long as there are some questions of law or issues raised in the pleadings that merit consideration, no matter how slight the chances of success, the court ought not to use its summary powers of dismissal and strike out the action.

[22] In short, this OS cannot be said to be obviously unsustainable within the meaning of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 47 (SC).

[23] On this ground alone, the application in encl 86 ought to be dismissed

in limine.

[24] However, on the assumption that I am wrong in the aforesaid conclusion and for the sake of completeness, I will now address the issues raised by the learned senior federal counsel.

[25] The learned SFC referred me to the judgment of the Supreme Court in *Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 (SC) ('*UEM* case') and submitted that the plaintiff lacks locus standi and is a stranger to this action. In short, the learned SFC contended that the plaintiff has no legal interest in the determination of the issue posed in question (ii). The plaintiff, too, according to learned counsel, failed to identify the specific constitutional right that he has been denied, which requires the determination of this court.

[26] My immediate response to this line of argument is that much water has passed under the bridge since the *UEM* case. The Federal Court, in its recent judgment in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829 (FC), had endorsed the dissenting judgment of Abdoolcader SCJ on the issue of locus standi in the *UEM* case.

[27] Abdoolcader SCJ, in registering what His Lordship termed as his 'vigorous dissent' in the *UEM* case, held that the judicial approach on the issue of locus standi that involves public law transcends every other consideration and must, *ex necessitate*, be that of not closing the door to the ventilation of a genuine public grievance subject always of course to a judicial discretion preclude the phantom busybody or ghostly intermeddler.

[28] By adopting the dissenting judgment of Abdoolcader SCJ in the *UEM* case, the Federal Court in *Pengurusan Trellises* had relaxed the locus standi requirement. Having said that, I will now deliberate whether the plaintiff has 'some interest' in this proceeding so as to clothe him with the necessary locus standi.

[29] In his AIS2, the plaintiff asserted that Act A514, which introduced the impugned clauses, is violative of the basic structure of the Federal Constitution. In para 11 of AIS2, the plaintiff affirmed as follows:

> [11] I also respectfully state that Parliament is not entitled to amend art 150 so as to oust the jurisdiction of the High Court to examine the validity of a decision made under art 150(1). Such an amendment cuts across the power of judicial review which is part of the basic structure of the Federal Constitution. Further, the addition of cl (9) offends the doctrine of parliamentary democracy which is part of the basic structure of the Federal Constitution.

[30] I have to underline that in the *UEM* case, Abdoolcader SCJ was of the view that in determining the issue of locus standi, 'the merits of the complaint are an entirely different matter'. At this stage, what the plaintiff needs to show is only an arguable case to defeat the application to strike out. Suffice it for me to say that the issue in question (ii) is of constitutional importance and arose from a genuine public grievance.

[31] It is from this perspective that I have come to the conclusion that the plaintiff, who is a practicing solicitor, is not a phantom busybody or ghostly intermeddler.

[32] As to the second ground, the learned SFC submitted that the constitutional issue in question (ii) has now become academic. It is for this reason that the learned SFC urged this court to conclude that it is no longer tenable for the court to answer question (ii) since the factual substratum underlying the question is no longer in existence.

[33] My attention was then drawn to the judgment of the Federal Court in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773 (FC). According to the learned SFC, the outcome of the constitutional issue in the form of question (ii) will not affect the positions of the parties at all. In other words, there is no remedy that this court could order to give effect to the applicant's view on the constitutionality of the impugned clauses.

[34] I take note of the argument forwarded by the learned SFC. However, Hasan Lah FCJ, in delivering the judgment of the Federal Court in *Bar Council Malaysia* also highlighted one limited exception. The limited exception, which I term as 'the Salem exception', can be found in the judgment of Lord Slynn of Hadley in *R v Secretary of State for Home Department, ex parte Salem* [1999] AC 450 (HL).

[35] In the course of his judgment, Lord Slynn referred to the judgment of the Court of Appeal in *R v Board of Visitors of Dartmoor Prison, ex parte Smith* [1987] QB 106 (CA). In that case, a prisoner was charged with an offence under the Prison Rules 1964 of doing gross personal violence to a prison officer. The Board of Visitors found that there was no case to answer. The prisoner was, therefore, no longer at risk from further disciplinary proceedings. The Court of Appeal held that although the prisoner was no longer at risk of further disciplinary proceedings, it did not deprive the court of jurisdiction to hear the appeal. It was further by the Court of Appeal that there were in it questions of general public interest; and that, even if the prisoner is rightly to be regarded as having no interest in the outcome, the court should, in the exercise of its

discretion, hear the appeal on the merits.

[36] Lord Slynn then continued:

> My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*.

[37] I take cognisance that the discretion to hear disputes, even in the area of public law, must be exercised with caution. In short, there must be a good reason to do so. To my mind, the issue raised in question (ii) in this OS gives rise to a discrete point of constitutional construction that this court has a discretion to hear and dispose of, even if there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*.

[38] It is for these reasons that I am inclined to conclude that the constitutional issue in question (ii) comes within the *Salem* exception, and I so hold.

THE ORIGINATING SUMMONS

[39] I will now proceed to deliberate in the main OS. Learned counsel for the plaintiff's arguments in support of the OS can be summarised as follows.

[40] Learned counsel for the plaintiff attracted my attention that a law amending the Federal Constitution, in this case, Act A514, may be struck down on the ground that it offends the basic structure of the Federal Constitution. Learned counsel cited *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 (FC) as an authority for the said proposition. Gopal Sri Ram FCJ, in delivering the judgment of the court, remarked as follows:

> Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional.

[41] Learned counsel for the plaintiff contended that the doctrine of basic structure is also part and parcel of our constitutional law upon the proper construction of art 4(1) of the Federal Constitution. It reads as follows:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Again, the Federal Court in *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 (FC), in departing from the principal and

concurring judgments in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 (FC) held that the word 'law' in art 4(1) necessarily encompasses 'federal law' that includes any constitutional amendment effected vide an Act of Parliament.

[42] *Dhinesh Tanaphll* is also an authority that the net result of the acceptance of the basic structure doctrine as contained in art 4(1) is that there are limits to the constitutional amendment power of Parliament. Nallini Pathmanathan FCJ, in delivering the judgment of the court, further held as follows:

> However, it is not every amendment that is forestalled, as stated earlier, but only those inconsistent with the FC. And the identity of the FC is protected by the express provisions of art 4(1) of the FC. The Constitution therefore circumscribes the boundaries beyond which an amendment would fail. Put another way, an amendment which contravenes the Constitution as a whole would not succeed.

[43] Relying on the said propositions, learned counsel for the plaintiff submitted that a constitutional amendment, as in Act A514, that attempts to oust the jurisdiction of a court to inquire into the validity of a law or other form of state action violates the doctrine of separation of powers by infringing upon the judicial power of the Federation.

[44] Learned counsel then referred me to what is now known as the trilogy of cases — *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anor case* [2017] 3 MLJ 561 (FC), *Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (FC) and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (FC).

[45] According to learned counsel, the attendant consequence of the proposition is that an ouster clause in the form art 150(8) of the Federal Constitution is violative of the basic structure and is therefore unconstitutional, null and void and of no effect.

[46] Datuk Bastian Vendargon, who represents the Bar Council as an *amicus curiae*, submitted that the exercise of the powers of the Yang di-Pertuan Agong to declare an emergency appears to be justiciable in the absence of art 150(8) of the Federal Constitution. Learned counsel cited the judgment of the UK Supreme Court in *R (on the application of Miller) v The Prime Minister; Cherry and ors v Advocate General for Scotland* [2019] UKSC 41 (SC), which held that the prerogative power of the Queen to prorogue Parliament and the lawfulness of the advice by the Prime Minister to the Queen to do so are reviewable by the court.

A **[47]** After having cited a line of authorities, learned counsel for the Bar Council urged this court to conclude that the doctrine of basic structure is intrinsic in the Federal Constitution and not merely one which is written or unwritten. In expanding his argument, learned counsel submitted that just as the rule of law or separation of powers are not written in the Federal **B** Constitution, these doctrines or features flow from their intrinsic existence in a living, breathing Westminster model of constitutional democracy.

[48] Learned counsel for the Bar Council then submitted that art 150(8) of the Federal Constitution, which was introduced by Act A514, appears to **C** provide for an exercise of unfettered power or discretion on the Yang di-Pertuan Agong. According to learned counsel, cl (8) of art 150 seeks to oust the jurisdiction of the court and, therefore, offends the basic structure that relates to the doctrine of separation of powers.

D THE ANALYSIS

[49] Let me begin by expressing my view on the doctrine of basic structure.

E **[50]** As highlighted earlier, the trilogy of cases, as explained by *Dhinesh Tanaphll* have put to rest on whether basic structure is an intrinsic part of the Federal Constitution.

[51] In *Semenyih Jaya* the Federal Court recognised the doctrine of basic **F** structure by making specific reference to *Sivarasa Rasiah*. The Federal Court reiterated that Parliament does not have the power to amend the Federal Constitution to the effect of undermining the doctrine of separation of powers and the independence of the judiciary. The Federal Court further adopted the reasonings of *Sivarasa Rasiah* that fundamental rights guaranteed under Part II **G** of the Federal Constitution are part of the basic structure of the Constitution and that Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure.

[52] In *Indira Ghandi*, Zainun Ali FCJ, in delivering the judgment of the **H** Federal Court, held that judicial power, in particular the power of judicial review, is an essential feature of the Federal Constitution. It was further held that features in the basic structure of the Federal Constitution cannot be abrogated by way of constitutional amendment.

I **[53]** *Alma Nudo* was decided by a coram of nine judges of the Federal Court, although Balia Yusof FCJ had retired by the time the decision was delivered. Richard Malanjum CJ, in delivering the judgment of the Federal Court in *Alma Nudo* cited *Semenyih Jaya* and *Indira Ghandi* and reiterated that the court recognised that the principle of separation of powers and the power of the

ordinary courts to review the legality of State action, are sacrosanct and form part of the basic structure of the Federal Constitution. A

[54] In these three cases, the Federal Court reasserted the doctrine of the separation of powers and judicial independence as part of the basic structure of the Federal Constitution. B

[55] The Federal Court in *Dhinesh Tanaphll* departed from the principal and concurring judgments in *Maria Chin*. The principal judgment in *Maria Chin* adopted a stricter approach in pronouncing that a doctrine of law, which includes the basic structure, cannot prevail over the written provision of the Federal Constitution. C

[56] It is, therefore, apparent that there is a stark contrast between the principal judgment in *Maria Chin* and the approach taken by *Dhinesh Tanaphll* which involves the same subject matter — whether the basic structure is an intrinsic part of the Federal Constitution. D

[57] The law, I believe, can be found in the instructive judgment of the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (FC). In delivering the judgment of the court, Peh Swee Chin FCJ held as follows: E

> If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision. F

[58] Applying the said proposition and based on the doctrine of stare decisis, I am bound to follow the judgment in *Dhinesh Tanaphll* which is the later decision of the Federal Court. G

[59] In the circumstances, I hold that the basic structure doctrine is an intrinsic part of the Federal Constitution. H

The Proclamation of Emergency prior to Act A514

[60] The next issue for me to determine is whether art 150(8) is violative of the basic structure of the Federal Constitution. To be more precise, whether it offends the doctrine of separation of powers as the plaintiff would like me to conclude in view of the ouster clause housed in art 150(8). I

[61] I do not respectfully think that we should see art 150(8) in isolation

since art 150 should be appreciated in its entirety. For one, it has to be read with art 40 of the Federal Constitution.

[62] Article 40(1) of the Federal Constitution, the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. However, under art 40(1A), in the exercise of his functions under the Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

[63] With that in mind, let us come back to art 150. The article permits the Yang di-Pertuan Agong to proclaim an Emergency. Article 150(1) states that if the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

[64] The next question that one has to ask is, can this proclamation, on the assumption that it was made pursuant to the advice of the Cabinet, be challenged or called into question in any court on any ground? Let us look at the historical perspective prior to the introduction of Act A514.

[65] This can be seen in *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119 (FC). On 14 September 1966, the Yang di-Pertuan Agong proclaimed a state of Emergency in Sarawak. On 19 September 1966, the Federal Parliament passed the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, amending cll (5) and (6) in art 150 of the Federal Constitution by inserting after 'this Constitution' the words 'or in the Constitution of the State of Sarawak' and providing further that, notwithstanding anything in the State Constitution, the Governor may summon the Council Negeri, suspend standing orders and issue directions binding on the speaker. Pursuant to that, the Governor, on 23 September 1966, summoned a meeting of the Council Negeri, which passed a vote of no confidence in the petitioner. The petitioner was then dismissed the following day.

[66] In his petition, the petitioner alleged that no grave Emergency had arisen in Sarawak which could not be effectively dealt with under the previous proclamation of emergency made on 7 September 1964, that the Federal Cabinet well knew that no such emergency existed 'whereby the security or economic life of Sarawak was threatened'. It was the petitioner's case that the proclamation was *in fraudem legis* in that it was made not to deal with grave emergency whereby the security or economic life of Sarawak was threatened

but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak, and that the amendment of cll (5) and (6) of art 150 of the Federal Constitution were null and void as ultra vires the Parliament and contrary, not only to art 150 and art 161E(2) of the Federal Constitution but also the entrenched provisions in art 41 of the Sarawak Constitution and relevant provisions in the Malaysia Act 1963.

[67] The Federal Court by a majority (Ong Hock Thye FCJ dissenting) held that it is incumbent on the court to assume that the Government was acting in the best interests of the State and to permit no evidence to be adduced otherwise. It was further held that the Yang di-Pertuan Agong alone could decide whether a state of emergency, whereby the security or economic life of the Federation was threatened, existed.

[68] In the course of his submission, Sir Dingle Foot, for the petitioner, cited a line of authorities and argued that the courts had observed that where a discretionary power was given to any person or authority, the courts would have some sort of control to see to it that the power was properly exercised and that there was no excess or abuse of power.

[69] This line of argument was rejected by Barakbah LP. The learned Lord President then remarked as follows:

> In my view those authorities relate only to delegated legislation and a Proclamation of Emergency by the Yang di-Pertuan Agong, who is the Head of State, does not fall under any of these categories.

[70] Azmi CJ (Malaya) (as the former Lord President then was) expressed the same view in his concurring judgment:

> In my view therefore notwithstanding the qualifying words the Yang di-Pertuan Agong in exercise of his power under cl (1) of art 150 must be regarded as the sole judge of that. He alone could decide whether a state emergency whereby the security or economic life of the Federation was threatened, did exist.

[71] However, as alluded to earlier, Ong Hock Thye FCJ (who later rose to CJ (Malaya)) had a different view. His Lordship disagreed that the 'circumstances which bring about a Proclamation of Emergency are non-justiciable'. Justice Ong was of the view that His Majesty is not an autocratic ruler since art 40(1) of the Federal Constitution provides that the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet. In any event, the Cabinet's responsibility for advising a proclamation of emergency was publicly admitted and never disclaimed.

[72] It is on this ground that Justice Ong held that art 150 does not confer on the Cabinet an untrammelled discretion to cause an Emergency to be declared at their whim and fancy. What is needed, therefore, according to the learned judge, is for the petitioner to establish that the Cabinet's advice to the Yang di-Pertuan Agong was tainted with *in fraudem legis* to make it amenable to judicial review. However, on the facts, the learned judge found that the petitioner had failed to establish this. Hence, the petition was dismissed though through a different route.

[73] The matter went up to the Privy Council. In dismissing the appeal, the Board did not address the question of justiciability directly but was the opinion that the onus was on the appellant to shew that the Proclamation of Emergency was *in fraudem legis* which the appellant failed to do; see *Stephen Kalong Ningkan v Government of Malaysia* [1968] 2 MLJ 238 (PC). Lord Macdermott, in delivering the opinion of the Board, observed as follows:

> Having regard to the conclusion already reached, however, their Lordships do not need to decide that question in this appeal. They do not, therefore, propose to do so, being of opinion that the question is one which would be better determined in proceedings which made that course necessary.

[74] There is another pre-Act A514 case that is worth mentioning. In *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 (PC), the Privy Council had the opportunity to review the exercise of power by the Yang di-Pertuan Agong to proclaim an area as a security area pursuant to a Federal law.

[75] Lord Diplock, in delivering the opinion of the Board, was of the view that the power to proclaim an area as a security area with the consequences that this will entail is a discretionary one. According to His Lordship, it is for the Yang di-Pertuan Agong (again, in effect, the Cabinet) to form an opinion on whether public security in any area of Malaysia is seriously disturbed or threatened by the causes referred to in s 47 of the Internal Security Act 1960, and to consider whether, in His Majesty's opinion, it is necessary for the purpose of suppressing organised violence of the kind described. But, as with all discretions conferred upon the Executive by Act of Parliament, the Board was of the view that it does not exclude the jurisdiction of the court to inquire whether the purported exercise of the discretion was nevertheless *ultra vires* if for example, it was done in bad faith.

[76] Not long after *Teh Cheng Poh*, Parliament amended the Federal Constitution and inserted art 150(8) through Act A514, which came into force effective from 15 May 1981.

[77] So much about the pre-Act A514 legal position.

POST-ACT A514 LEGAL POSITION

[78] The Federal Court had the opportunity to discuss the legality of art 150(8) in *Dato' Sri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 (FC). In that case, the appellant was convicted and charged under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('the Ordinance'). In the process, the Dewan Rakyat passed a resolution to annul the Ordinance on 8 January 1998, although it had yet to be laid before and passed by Dewan Negara. In his submission, Raja Aziz Addruse, learned counsel for the appellant, argued that it would be invidious and oppressive to subject the appellant to prosecution under a law that ceased to have effect. Counsel argued that since the Dewan Rakyat had passed a resolution to annul the Ordinance on 8 January 1998, it would only be a matter of time for a second resolution to be laid before and passed by the Dewan Negara.

[79] Therefore, the central issue before the Federal Court was the alleged abuse of process. Haidar FCJ, in his judgment, remarked that while the court should not be impotent when it comes to abuse of its process, the application of the doctrine will depend on the facts of a particular case and the laws applicable. The Federal Court held that there is the overriding provision in art 150(8)(b) of the Federal Constitution that 'notwithstanding anything in this Constitution,' the court shall have no jurisdiction to entertain or determine in whatever form, regarding the validity of, inter alia, the continuation in force of the Ordinance.

[80] Haidar FCJ (later CJ (Malaya)) further held as follows:

> It may be argued that such a constitutional provision would amount to 'closing the doors of the court' and is therefore harsh and unjust. Our answer is that this issue should be addressed to the Legislature and not the courts by those who disagreed with such a provision and they have their remedy at the ballot box.

[81] On the strength of the aforesaid proposition, of which I am bound, I am of the respectful view that this court should give effect to the ouster clause in art 150(8)(b) of the Federal Constitution. The majority of the authorities I have cited seem to suggest that in exercising His Majesty's power in proclaiming the Emergency, the Yang di-Pertuan Agong acts on the advice of the Cabinet. It is, therefore, a matter of policy that involves the security, or the economic life, or public order in the Federation.

[82] In short, these are matters of security and policy considerations within the Executive domain. What, then, is the position of the apex court? In *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 841 (FC), the Federal Court was of the view that matters of security have always been considered by the courts to have a peculiar texture. They have

called for special treatment. As recent as in 2021, the Federal Court by a majority (Vernon Ong FCJ, dissenting) in *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2021] 6 MLJ 68 (FC) recognised that matters of security involve policy considerations which are within the domain of the Executive. Even Vernon Ong FCJ, in his dissenting judgment, cited *Nasharuddin Nasir* and reiterated that the courts have always been circumspect in reviewing legislation dealing with national security. According to the learned judge, the courts will defer to the judgment of the Executive on issues of national security 'as only the Executive may possess information on the matter'.

[83] In *Dhinesh Tanaphll*, Nallini Pathmanathan FCJ took cognisance that the courts are not equipped to deal with matters of policy and do not interfere in the same, as such matters fall within the purview of the other branches of government, particularly the Executive.

[84] Having said that, I have to underline that when the security of the Federation is threatened, and the Cabinet, in its wisdom, based on the intelligence information it possesses, advises the Yang di-Pertuan Agong to proclaim an Emergency, it is not for the court, based on art 150(8)(b) of the Federal Constitution, to determine or entertain its validity. I dare to venture that an attempt by the court to intervene is in itself violative of the basic structure of the Constitution since it offends the doctrine of separation of powers.

FINDINGS

[85] For the aforesaid reasons, my findings are as follows:

(a) the doctrine of the basic structure is an intrinsic part of the Federal Constitution. On the authority of *Dhinesh Tanaphll* and *Sivarasa Rasiah*, unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional;

(b) although the Proclamation of Emergency is made by the Yang di-Pertuan Agong under art 150, under art 40(1), the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet;

(c) the courts have always considered security matters to have a peculiar texture;

(d) the Cabinet, being the Executive arm of the government, possesses intelligence information on security matters that the courts do not have access to, and therefore, will be in the best position to advise the Yang di-Pertuan Agong;

(e) on the authority of *Dato' Sri Anwar Ibrahim v Public Prosecutor* and the

overriding provision in art 150(8)(b) of the Federal Constitution that 'notwithstanding anything in this Constitution', the court shall have no jurisdiction to entertain or determine in whatever form, regarding the validity of a Proclamation of Emergency. The phrase 'notwithstanding in this Constitution' includes the basic structure of the Federal Constitution;

(f) the exercise of powers by the Yang di-Pertuan Agong, in effect, the Cabinet, in proclaiming the Emergency under art 150 of the Federal Constitution is therefore not justiciable;

(g) while the constitutional provision in respect of the ouster clause would amount to 'closing the doors of the court' looks harsh and unjust, the remedy lies in the Legislature and not the courts;

(h) art 150(8) of the Federal Constitution is therefore not violative of the basic structure of the Federal Constitution and cannot be struck down under art 4(1); and

(i) on the contrary, any attempt by the court to intervene will offend the doctrine of separation of powers, which is part of the basic structure of the Federal Constitution.

[86] There shall be no order as to costs.

Enclosure 86 and OS dismissed.

Reported by Ashok Kumar